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An Examination and Analylsis of the Equity and Adequacy Concepts of Constitutional Challenges to State Education Finance Distribution Formulas

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AN EXAMINATION AND ANALYSIS OF THE EQUITY AND ADEQUACY CONCEPTS OF CONSTITUTIONAL CHALLENGES TO STATE EDUCATION FINANCE DISTRIBUTION FORMULAS

*R. Craig Wood and Bruce D. Baker**

I. INTRODUCTION

There has been an intense struggle concerning fiscal resources involving public and elementary and secondary education for many years. It has been noted in the literature that there exist several fundamental reasons that prevent any rational basis for dismissing the importance of equitable and adequate funding for public elementary and secondary education. Undeniably, public elementary and secondary education distributes economic and social opportunities in a nation fueled by competitiveness. Further, these opportunities depend in large measure on the quality of the public elementary and secondary education. Despite continued debate concerning the strength of the relationship between additional dollars for schools and improvement in student outcomes, school quality is heavily conditioned by fiscal resources that are purchased with local and state taxes. As it has been noted in the social science literature, absent the ability to purchase these inputs, public elementary and secondary education must fail because altruism is not a sufficiently offsetting condition within our society. Also, people who argue for the irrelevance of money regarding public education still prefer a larger share for their own children's education. This preference is reflected in the undeniable fact that until money is irrefutably shown to make no difference, its effect must be presumed from the behavior of wealthy individuals who choose wealthy communities with high expenditure school districts for their children.[1]

Education finance as an academic discipline has emerged only since the early 1900s. It is important to note that this academic discipline is distinctly different from economics and the study of broader areas of public policy, but it encompasses aspects of both. The issue of financing public elementary and secondary education is such a part of the social, fiscal, and legal fabric of our society that it is only a small step to move the financing of public education into that stream of political and legal activity within every state, especially considering the wider implications of education finance, such as equality of educational opportunity as it relates to matters of discrimination and opportunity. The study of education finance litigation is actually the study of the litigation of state aid distribution formulae and the

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1. *See generally* R. CRAIG WOOD & D. C. THOMPSON, FINANCING PUBLIC EDUCATION (2005).

results of those formulae in terms of the expenditure and revenue patterns to school districts.[2]

At the federal level, litigation has focused on the United States Constitution in the context of interpreting the limits of federal responsibility to embrace education and on any guarantees construed in the Constitution. At the state level, litigation has been focused on constitutional as well as statutory provisions of the individual states. At both levels, these questions have been complex and difficult. Within this legal environment is the constant issue of whether the parties have been able to prove their arguments and statements via sound methodological research and data in terms of acceptable education finance statistics and research design. In these instances litigants have sought to determine the meaning and extent of equal opportunity and to test the strength and limits of constitutional and statutory language. The challenges to education finance distribution formulae have traditionally centered on three strategies: education as a fundamental right, the equal protection of the laws, and the education articles of the individual state constitutions.

Historically, education finance litigation has focused its efforts regarding issues of equality and opportunity. Recently, more cases have addressed the adequacy of education finance distribution formulae in terms of meeting state constitutional and statutory guidelines. The vast majority of state court examinations are filtered through a social/interpretive filter regardless of the nature of the presentations. This filtering process has lead to judicial translations of phrases like "sound basic education" into "meaningful high school education, one which prepares them to function productively as civic participants"[3] or "thorough and efficient education" into "preparation for useful and happy occupations, recreation and citizenship."[4] Increasingly, attempts are being made to further operationalize these translations and empirically estimate the costs of achieving the stated goals, assuming those goals to be both robust and measurable.

II. FEDERAL ROOTS[5]

Legal struggles concerning the financing of public education are long-standing. Litigation has raised both federal and state questions based on particular strategies aimed at various features of federal and state laws including applicable state constitutional clauses.

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2. *See generally*, R. C. WOOD & DAVID C. THOMPSON, EDUCATION FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS, AN ANALYSIS OF STRATEGY (Educ. Law Ass'n 2d ed. 1996) (discussing education finance litigation).

3. Campaign for Fiscal Equity v. State, 801 N.E.2d 326, 332 (N.Y. 2003).

4. Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979).

5. *See generally* WOOD & THOMPSON, *supra* note 2.

While no federal school finance lawsuits existed before the mid-Twentieth Century, the foundations were laid by American preoccupation with equality and supported by a series of broader issues with education finance overtones that would only later become apparent. The Fourteenth Amendment's equality provisions led to three litigation strands[6] that were to have a powerful impact concerning education finance. The first strand was a series of lawsuits under the concept of desegregation, in which enforcement of equality before the law for all persons was sought.[7] The second strand was a series of cases known as the reapportionment decisions, establishing the principle of "one man, one vote."[8] The third strand emerged from lawsuits that became known as the indigent defendants and administration of criminal justice cases, which established that defendants may not be denied the right of appeal simply because of inability to pay for a transcript of trial proceedings because such denial is tantamount to wealth discrimination.[9] Although seemingly unrelated to education finance, these strands were to lay a framework for equal protection in resource distribution.

Desegregation cases were obvious for the eventual impact on public schools. Desegregation cases were fervently contested for many years, with great overtones for the costs and structure of public elementary and secondary education. The question of whether differential wealth, under certain circumstances, could be a barrier to equality under the law began to emerge over time. If this were true, an entirely new meaning to equality would be formed.

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6. Phillip B. Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 584 (1968).

7. The history of racial equality is too complex to fully describe herein. In an educational context, it is obvious that *Brown v. Board of Education*, 347 U.S. 483 (1954), was the most critical. This analysis, however, is aided by the recognition of a long history of such cases. *See generally* McLaurin v. Okla. State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Missouri ex. rel. Gaines v. Canada, 305 U.S. 337 (1938); Gong Lum v. Rice (275 U.S. 78 (1927); Carter v. Sch. Bd., 182 F.2d 531 (4th Cir. 1950); Davis v. County. Sch. Bd., 103 F. Supp. 337 (E.D. Va. 1952); Butler v. Wilemon, 86 F. Supp. 397 (N.D. Tex. 1949); Pitts v. Bd. of Trs., 84 F. Supp. 975 (E.D. Ark. 1949); and Freeman v. County Sch. Bd., 82 F. Supp. 167 (E.D. Va. 1948).

8. These cases are also multiple and meaningful. *See generally* Wesberry v. Sanders, 276 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Davis v. Mann, 377 U.S. 678 (1964); Gray v. Sanders, 372 U.S. 368 (1963); and Baker v. Carr, 369 U.S. 186 (1962) (accident of geography and arbitrary boundaries of governments may not be a basis for discrimination among otherwise equal citizens, in this instance forbidding the requirement that one must pay property taxes in order to vote).

9. These cases are also multiple and far ranging. *See generally* Lubin v. Panish, 415 U.S. 706 (1974) (requiring a filing fee as prerequisite to the right to vote is wealth discrimination); Shapiro v. Thompson, 394 U.S. 618 (1969) (a law against bringing indigents into a state violated the right to interstate travel); Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (state poll tax was wealth discrimination); and Griffin v. Illinois, 351 U.S. 12 (1956) (denying an indigent defendant a transcript of trial for appeal was wealth discrimination).

These strands were actually the expression and extension of judicial sympathy to a fairly liberal construction of the meaning of equality that had already resulted in establishment of certain fundamental rights under the law. In addition to the rights and liberties specifically guaranteed by the United States Constitution, the United States Supreme Court had at various times enumerated several other rights which it found to be so fundamental that those rights could not be abridged or denied except by the most exacting due process of law. Several of these rights were established in the cases that formed the strands; e.g., the Court had found a fundamental right to interstate travel,[10] procreation,[11] voting,[12] and the right to criminal appeal.[13] The essence of fundamental rights, however many or few, was to assure the equality of each citizen so that arbitrary abridgment of certain freedoms could never be countenanced in a democratic nation.

The effect of the Fourteenth Amendment's nondiscrimination clause was to entrust two distinct lines of litigation. The first line resulted from unequal treatment of a suspect class. As defined by the courts, various conditions might lead to establishment of suspect class wherein "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[14] Subsequent litigation was to create suspect classes for race,[15] national origin,[16] and alienage,[17] with special empathy for other sensitive constitutional concerns. The first line drew its basis from illegitimate differential treatment on the basis of immutability whereby people were discriminated against for characteristics they could not change. The second line of litigation resulted from abridgment of some fundamental right. The second line drew justification from constitutional provisions or, alternatively, whether the Supreme Court would newly construe a fundamental right for reasons of its own.

The concepts of suspect class and fundamental right were vitally important to equal protection litigation because, if a court were persuaded that a fundamental right or suspect class was discriminated against, courts would evaluate an act or a law with scrutiny. Race was clearly immutable, and alleged violation of the rights of a member of this suspect class would trigger an exacting analysis under anti-discrimination equal protection laws;

10. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).
11. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942).
12. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).
13. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956).
14. United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938).
15. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).
16. *See, e.g.*, Oyama v. California, 332 U.S. 633 (1948).
17. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371 (1971).

similarly, abridgment of a fundamental right would trigger the same sharp scrutiny. Under these conditions, establishing the characteristics of suspect classes and increasing the number of suspect classes became paramount to successful equal protection challenges. The second line of fundamentality was equally critical in that any right declared to be fundamental would demand strict scrutiny under the law. These key concepts were thus the first strategy of equal protection analysis because if violation of a fundamental right were shown or if a suspect class were established, then the burden of proof would shift to the defendant, i.e., the state, to show a compelling interest in the law. This test of strict scrutiny became the sought-after judicial standard, as the only other standard of rational basis would require only some sensible reason to allow a law to stand.

As Kurland noted, the concepts derived from these three broader strands were quickly applied to education,[18] wherein litigants launched concerted efforts to establish suspectness and fundamentality in education. Although the origins of equality in American law are more complex than briefly stated within this article, these strands illustrate why it was ultimately sensible in an historical context to first bring lawsuits involving public elementary and secondary education at the federal level. Regardless of whether the topic was race discrimination or fiscal resources, the goal of any such lawsuit would be to seek federal protection wherein inequality would be alleged and from which it would be claimed that equal educational opportunity was denied. Thus, from a simple hierarchical perspective, if education were found in some way to merit the protections of the Fourteenth Amendment, especially in areas where abridgment would be severely proscribed, new federal law would be written that would also be controlling on the states. The first alternative required a ruling that education was a fundamental right. Failing this, the only alternative was to establish a protected class against whom illegitimate discrimination in education could be shown.

Winning a federal lawsuit was thus critical. If the broader cases could be analogized to education, the successful application meant the establishment of constitutional protections in a totally new arena. If neither fundamentality nor suspect class were established, failure was assured because the doctrine of limited federal powers given the Tenth Amendment's silence regarding education would release the coveted claims of federal protection. Failure of a federal case meant that equality of educational opportunity would either be lost or turned to the states without the power of the United States Constitution. Thus, from an historical perspective, the thinking of the early education finance scholars was clear, if not flawed in the reality of the overwhelming complexity of the question.

18. Kurland, *supra* note 6, at 587–88.

A. The Federal Response

Although federal litigation regarding racial equality spanned many decades,[19] it was in *Brown v Board of Education* [20] decision where equality of educational opportunity under the law received its greatest impetus. In an often-quoted passage the Court proclaimed:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[21]

Invoking the equal protection clause of the Fourteenth Amendment, *Brown* spoke strongly to the value of education, calling it one of the most important functions of government and noting its central role to preservation of a literate and free people. The Supreme Court in *Brown* declared that education was a right that must be made available on equal terms.

It could be argued that if the Court's apparent mandate in *Brown* were to be fully satisfied, equal educational opportunity would have strong application to fiscal resources because uneven revenues are at the root of most other forms of inequality. Although it had not been a simple matter to force condemnation of racial inequality, at least there had been a long record of discrimination lawsuits against which concepts and theories could be empirically tested. In education finance inequality there was no rich data driven empirical history on which to rely. The question first became one of a conceptual nature, rather than a formal legal and research standard, from which litigants would develop and demonstrate their arguments. The only other alternative was to make analogy to the strands cited earlier, supported by the strong language of *Brown*.

The first strand of unequal treatment under the law seemed well established in *Brown* because school children must be provided equal opportu-

19. Litigation regarding this issue is longstanding. *See, e.g.*, Roberts v. City of Boston, 59 Mass. 198 (1850) (Massachusetts court addressed school segregation under 1780 state equality statute).

20. 347 U.S. 483 (1954).

21. *Id.* at 493.

nity. The second strand also seemed viable because it was reasonable to draw an equal protection analogy to geographic discrimination because it was widely known that educational opportunity varied greatly based on residence. The third strand also seemed applicable, as there was sufficient case law to argue that wealth may not serve to bar equality under the law. Of particular support to the latter theory was the belief that school district wealth could be the basis of wealth discrimination, i.e., leading to establishment of a new suspect class. In plaintiffs' minds, wealth suspectness was grounded in case law and it was simply a matter of transferring the *Brown* logic condemning racial inequality to fiscal inequality. Plaintiffs relied on the fact that the Supreme Court had long ago said in *United States v. Carolene* that "[p]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily . . . relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[22] In addition, there were the voting rights and criminal appeals cases cited earlier in which the Court had held that classifications based on wealth were to be strictly scrutinized.[23]

These conditions seemed ripe for a federal decision extending equality of educational opportunity to include fiscal equality. The first suit to be filed was *Burruss v. Wilkerson*,[24] brought in Virginia in 1968. The plaintiffs in *Burruss* based their claims on the Fourteenth Amendment, arguing that inequality in the school division's (district's) physical and instructional facilities resulted in a lack of equal protection of the law because the quality varied among school divisions. An examination of the arguments made by the plaintiffs at trial does not reveal very much quantitative discussion. Largely, the plaintiffs relied on anecdotal stories of the conditions of buildings and curriculum in attempting to prove their contentions. Issues of test scores, or any robust statistical evidence, appeared lacking. Of course, it should also be noted that in 1968 such standards were largely undeveloped within the realm of education finance analysis. However, what is critical to note is how much this approach has not changed in numerous other cases and more than thirty-five years. A three-judge United States District Court which heard oral arguments rendered a decision in May 1969:

> The existence of such deficiencies and differences is forcefully put by plaintiffs' counsel. . . . We do not believe they are creatures of discrimi-

22. 304 U.S. 144, 153 n.4 (1938).

23. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois., 351 U.S. 12 (1956). This logic was especially supported as the Court had stated in ruling against a poll tax, that "[l]ines drawn on the basis of wealth or property, like those of race, are disfavored." *Id.* at 668.

24. Burruss v. Wilkerson, 310 F. Supp. 572 (D.C. Va. 1970), *aff'd*, 397 U.S. 44 (1970).

> nation by the State. Our reexamination of the Act confirms that the cities and counties receive State funds under a uniform and consistent plan. . . . We can only see to it that the outlays on one group are not invidiously greater or less than that of another. No such arbitrariness is manifest here.[25]

The court added that ". . . the courts have neither the knowledge, nor means, nor the power to tailor the public monies to fit the varying needs of these students throughout the state."[26]

A second federal case of *McInnis v. Shapiro*[27] was decided in Illinois in the same year. Heard in United States District Court and affirmed by the United States Supreme Court,[28] *McInnis* was also a Fourteenth Amendment equal protection suit seeking to overturn the state education funding formula on the grounds that unequal educational expenditures based on variable property values as tax rates of local districts were arbitrary and an unreasonable denial of equal protection of the law. The plaintiffs' evidence consisted largely of descriptive data concerning tax rates and related information. The court ruled for the defendant state. The court noted several features that were to become summative of the federal position in school finance litigation.

While the court acknowledged wide variations in expenditures per pupil based on wealth, the court stated its vulnerability before the question in three respects. First, variations in revenue were not on the face invidious and arbitrary. Second, the legislature's decision to allow local choice and experimentation was reasonable, particularly since the common school fund placed, at that time, a $400 minimum base under each student. Third, the court ruled that there was no Constitutional requirement establishing rigid guidelines for equal dollar expenditures under the Fourteenth Amendment's equal protection provisions. The plaintiffs had shown descriptive data regarding tax rates yet never adequately demonstrated the nexus between tax rates and achievement or tax rates and a variety of input variables. And fourth, the court was clear in stating that allocation of revenue was a policy decision better suited to legislatures.

In both instances federal courts had uniformly refused to intervene on three importantly consistent grounds. The first rationale was a plain reading of the Fourteenth Amendment, noting no equal protection mandate for unequal revenues. The second rationale was equally important, as the court deferred to the legislative branch by relying on the separation of powers

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25. *Id.* at 574.

26. *Id.*

27. McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969).

28. *Id.*

doctrine in the absence of blatant invidious discrimination. The third rationale applied to the court's puzzlement as it noted its lack of judicially manageable standards, even if it were to rule for plaintiffs. Equality, then, to the federal court was a negative standard in that no affirmative duty was owed by the state to each child for resource equality; rather, the absence of something was not the same as invidious denial of that object.

The final federal issues were determined by the U.S. Supreme Court in *San Antonio Independent School District v. Rodriguez*.[29] The case had actually been filed in 1968, and a three-judge panel had rendered a decision in 1971 holding the Texas system of school finance unconstitutional under the Fourteenth Amendment.[30] The case was then accepted on appeal by the United States Supreme Court. The plaintiffs argued key points taken from earlier successful but broader litigation. The plaintiffs contended that the Texas funding system violated the federal equal protection clause by discriminating against a class of poor and that students were denied their right to an education. Plaintiffs were actually arguing for wealth as a suspect class and for fundamentality at the highest level in an all-out effort to force strict judicial scrutiny.

The Supreme Court, however, refused to accept plaintiffs' arguments because it found no class of persons who were identifiably suspect. The plaintiffs argued that that the injured class should be comprised of all students living in poor school districts, rather than poor students themselves. Justice Powell, writing for the majority, noted that wealth discrimination in prior cases had historically been confined by the Court to personal wealth, and that the class in *Rodriguez* was not one for which special protection is usually provided, i.e., it was neither politically powerless nor a discrete or insular minority.[31] The Court further noted that individual income did not necessarily correlate with district wealth and that, even if the correlation were strong, the Court's historic application of wealth discrimination under strict scrutiny had been limited to absolute deprivation rather than relative differences.[32] Under these conditions, the Court found no distinct suspect class and held that since no student was absolutely deprived of an education, fiscal inequalities were of only relative difference and not entitled to wealth suspectness.

The Court in *Rodriquez* then turned to plaintiffs' claims for fundamentality, again refusing to accept their arguments. Plaintiffs had recognized the difficulty of this argument and had based their claims on the relationship of education to other extant fundamental rights in an effort to establish a clear

29. 411 U.S. 1 (1973).

30. Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280 (W.D. Tex. 1971).

31. Rodriguez, 411 U.S. at 27–28.

32. *Id.* at 20–22 (noting Griffin v. Illinois, 351 U.S. 12 (1956) on transcripts; Douglas v. California, 372 U.S. 353 (1963) on hiring counsel).

nexus.[33] Accordingthis concept, public education was inextricably tied to other existing fundamental rights wherein the intelligent exercise of the right to vote and the right to free speech were said to depend on education. The Supreme Court refused these arguments, however, stating that it saw no more connection between public education and these rights than it could find between housing, food, or other subsistence and the right to vote.[34] The Supreme Court especially noted a difference between hindering a child from a public education and the state education finance distribution formula that, in its view, instead sought to improve available offerings.[35] Although the Supreme Court noted wide disparities among Texas school districts, it rejected the standard of strict scrutiny, stating that a rational relationship was all that was required to defend a state distribution formula where no invidious discrimination could be found. In *Rodriquez*, a rational basis could be found in the state's goal of promoting local control of schools—a view supported by the Supreme Court's own words:

> Education, perhaps even more than welfare, presents a myriad of intractable economic, social, and even philosophical problems. The very complexity of the problems of financing and managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them, and that, within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect.[36]

The concept, as expressed in *Rodriquez,* was rejected by the U.S. Supreme Court. Contrary to *Brown*, there was apparently no fundamentality, no suspect class, and no equal protection for education except in cases of total educational deprivation or in the established instances of invidious discrimination such as race. It appeared from *Rodriguez* that little equality of educational opportunity could be gained apart from race, as the Supreme Court had sanctioned legislative prerogative and declared judicially unmanageable standards, while unwilling to go beyond the historically narrow application of the race relations.

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33. *Id.* It will be seen under state review later that this claim was not entirely novel, as it had been successfully utilized in *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971). It had not, however, been tried at the federal level even though the state court in *Serrano* invoked the Fourteenth Amendment in its decision. The lack of demarcation between overlapping federal and state chronology should be noted, as state litigation had already begun following McInnis and Burruss, but prior to Rodriguez.

34. *Id.* at 37.

35. *Id.* at 39.

36. *Id.* at 42.

The Supreme Court ruling in *Rodriguez* had one primary effect concerning education finance litigation. The effect was to turn litigants' attention to the state courts.

B. The Post-*Rodriguez* Aftermath

Although *Rodriguez* dictated that constitutional challenges would be based on each state's constitution, a few federal challenges remained and are important to note.[37] Post *Rodriguez* the Supreme Court ruled in *Plyler v. Doe*[38] that the refusal by a state to educate undocumented school-aged children involved an area of special sensitivity that would merit constitutional pleas of equal protection. While the Court in *Plyler* stopped short of declaring education a fundamental right, it stated a higher level of scrutiny and interest in cases of educational deprivation, utilizing language that seemed less closed to fundamentality under such conditions. The majority opinion in *Plyler* stated that while its ruling in *Rodriguez* remained intact, it was deeply concerned that education was more than a mere service and convenience to citizens:

> Education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills on which our social order rests.[39]

A second, related decision occurred in 1985, when the Court took up the question of whether challenges to disparities created by a state's differential allocation of fiscal resources were substantively different from *Rodriguez* type challenges to disparities allowed by a state as a function of local control. Central to the *Rodriguez* decision was the Court's acceptance of the doctrine of local control as an acceptable rational basis for differential resources. In *Papasan v. Allain,* the Court determined that while the *Rodriguez* ruling and rational basis did apply, challenges to disparities created by

37. *See* Papasan v. Allain, 478 U.S. 265 (1986). In Papasan the data was reflective of Average Current Expenditures per Pupil in ADA, Average Current Expenditures per Pupil for Instructional Costs in ADA, and the Average Current Expenditure per Pupil in ADA Less Transportation. Additionally, receipts for public schools were examined. No statistical evidence was presented in the court record. *See also* Sch. Bd. of Livingston v. La. State Bd. of Elementary and Secondary Educ., 830 F.2d 563 (5th Cir. 1987).

38. 457 U.S. 202 (1982).

39. *Id.* at 221.

state legislatures rather than allowed due to local control, were not foreclosed by *Rodriguez*.[40]

The final important, yet often overlooked, federal case occurred in 1988 in *Kadrmas v. Dickinson Public Schools*.[41] In *Kadrmas*, plaintiffs had argued that charging for school bus service was, in fact, denial of equal protection because the plaintiff child was wealth-disadvantaged. Although the Court found for the defendant state, its five to four vote was sharply divided and indicative of the constantly unsettled nature of a federal claim involving education and further noted, in strong language, that there are variances and exceptions that preclude absolutism in interpreting *Rodriguez*. The dissenting opinion sharply stated:

> The Court therefore does not address the question whether a state constitutionally could deny a child access to a minimally adequate education. In prior cases this court explicitly has left open the question whether such a deprivation of access would violate a fundamental constitutional right. That question remains open today.[42]

From these challenges, several observations may be stated. First, it can be gathered that the Supreme Court is sympathetic to the problems of judicially manageable standards. Second, the Supreme Court is quick, though not predestined, to uphold legislative prerogative. Third, the Supreme Court is reluctant to declare education a fundamental right, and any reversal is not likely to occur lightly. Fourth, the Supreme Court is not yet willing to create new suspect classifications. Fifth, in the case of education, the Supreme Court has narrowly interpreted equal protection to mean racial equality or, alternatively, to mean absolute deprivation which has fiscal overtones. Sixth, *Rodriguez* has been the controlling precedent in subsequent litigation, and the Supreme Court itself has utilized *Rodriguez* to reject further assaults on a federal educational right. But seventh, all assaults following *Rodriguez* have been narrowly drawn, and it is clear the Supreme Court holds an undefined interest in education that may eventually emerge. Future federal cases will depend on changes in the Supreme Court's make-up. But it is finally clear that no firm federal case yet exists—a reality that has in fact effectively turned most traditionally pure education finance litigation to the state courts for adjudication.

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40. *See generally* Preston C. Green & Bruce D. Baker, *Circumventing Rodriguez: Can Plaintiffs Use the Equal Protection Clause To Challenge School Finance Disparities Caused by Inequitable State Distribution Policies*, 7 TEX. F. ON C.L. & C.R. 141 (2002).

41. 487 U.S. 450 (1988). For a more complete discussion of *Kadrmas*, see R. Craig Wood, Kadrmas v. Dickinson Public Schools*: A Further Retreat From Equality of Educational Opportunity*, 15 J. EDUC. FIN. 429, 429–36 n.3 (Winter 1990).

42. *Id.* at 466 n.1.

C. The State Response

The California Supreme Court in *Serrano v. Priest*[43] ruled on behalf of the plaintiffs in this classic model for state education finance litigation. The plaintiffs charged that the state financial aid distribution formula for distributing financial aid to public school districts violated the federal and state constitution's guarantees of equal protection. Inherent to these allegations were concepts of fundamentality, wealth suspectness, and equal protection under the state constitution. The plaintiffs alleged that, as a direct result of the state distribution formula for schools, substantial disparities existed in the quality and extent of educational opportunities. Plaintiffs also alleged that, as a result of such an education finance distribution formula, they were likewise required to pay higher tax rates in order to obtain the same or lesser educational opportunity. Further, plaintiffs alleged that these realities worked jointly to deny children the equal protection of the laws, to deny them their fundamental right to education, and to make the quality of education a function of residence wherein quality varied in response to local district wealth. Plaintiffs sought to invalidate the state aid distribution formula under the federal and state constitutions.

The California Supreme Court found for plaintiffs on every cause. In establishing the facts, the state supreme court first noted that the root of disparity was unmistakable in that aid was insufficient to offset the widely disparate assessed valuation per pupil in Baldwin Park of $3,706, compared to Beverly Hills' valuation of $50,885 per pupil, a ratio of 1:13. Second, the state supreme court noted that state aid actually widened the gap between rich and poor school districts, as state fiscal aid was distributed irrespective of wealth wherein rich and poor districts alike were aided by the state. Third, the court noted that such aid was effectively meaningless to poor districts. The state supreme court rejected the state's traditional claim that suspectness lay only with individual wealth.

The court stated that education in a modern industrial state was indispensable, and noted that education had two major distinguishing attributes that qualified it as a fundamental right. First, the court stated that education was a major determinant of an individual's chances for economic and social success in a competitive society. In comparing education to other fundamental rights, the supreme court justices stated "[w]e think that from a larger perspective, education may have far greater social significance than a free transcript or a court-appointed lawyer."[44] The court then considered the education article of the California state constitution,[45] declaring fundamen-

43. 487 P.2d 1241 (1971).

44. *Id.* at 1258.

45. "A general diffusion of knowledge and intelligence being essential to the preserva-

tality on five bases. First, education was essential to free enterprise democracy. Second, education was universally relevant. Third, unlike other government services, public education continued for a lengthy period of time. Fourth, education was unmatched in molding youth and society. And fifth, education was so important that the state had made it compulsory.[46] The state supreme court then ruled that plaintiffs were entitled to strict scrutiny equal protection, and that the federal and state equal protection clauses were both impermissibly violated.

Although *Rodriguez* would later invalidate the federal claims in *Serrano*, the case was powerful and decisive for education finance reform across the nation. First, *Serrano,* dependant upon the state, proved that the meaning of equal educational opportunity could be so broadly sweeping as to include education finance. Second, *Serrano* proved that states could be vulnerable to constitutional attack, even though the federal courts had been unassailable. Third, under state provisions *Serrano* successfully established all three claims of fundamentality, wealth suspectness, and equal protection. Fourth, *Serrano* had an immediate effect, sparking dramatic reform of state aid distribution formulas in many states. Finally, *Serrano* compelled the flurry of reform both through legal standards and by the court's view on how inequity might be redressed. *Serrano* proposed several alternatives, including full state funding and statewide taxation.

The impact of *Serrano* was accelerated by the New Jersey superior court decision in 1972 in *Robinson v. Cahill.*[47] Plaintiffs had alleged that the state education finance distribution formula violated federal and state equal protection laws and the fundamental right to an education, in that tax revenues varied greatly by school district wealth and were inadequately unequalized by the state of New Jersey. According to plaintiffs, there existed a state denial of equal educational opportunity and equal protection by making the quality of education dependent on the wealth of each local school district. The plaintiffs argued that the state of New Jersey had abrogated its responsibility to public elementary and secondary education because the state statutes were not equal in effect on all citizens where equal tax effort did not produce equal tax yield, despite the fact that state aid provided approximately twenty-eight percent of all school district revenues. The plaintiffs presented exhaustive descriptive statistics in terms of tax rates, revenue and expenditure patterns, as well as disparity patterns across the state. The

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tion of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." CAL. CONST., art. IX.

46. *Serrano*, 487 P.2d at 1258–59.

47. 287 A.2d 187 (N.J. Super. Ct. Law Div. 1972), *modified and aff'd*, 303 A.2d 273 (N.J. 1973).

trial court agreed in principle, and the case was taken on appeal by the state supreme court.

The 1973 New Jersey Supreme Court ruling, which came after *Rodriguez*, was notable for many important reasons. First, the New Jersey Supreme Court refused to rule for fundamentality. The United States Supreme Court had said that:

> every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system . . . [i]t would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.[48]

Second, the New Jersey Supreme Court noted that the United States Supreme Court had never cited *Brown* as a case involving the fundamental right concept, stating that *Brown* would point in the opposite direction since it declared education to be a most important function of state and local governments.[49] Third, the New Jersey Supreme Court refused to find wealth a suspect class, noting that "[I]f this is held to constitute classification according to 'wealth' and therefore suspect our political structure will be fundamentally changed."[50] Under these conditions, the court could find no basis for fundamentality or federal equal protection. However, a fundamental and significant turning point was that the New Jersey Supreme Court ruled the state system unconstitutional by invoking the education article of the state constitution that required a "thorough and efficient" system of education. A requirement that was not met due to a lack of equalization in revenues violated the state's equal protection clause.

Robinson was equal or greater in significance than either *Serrano* or *Rodriguez*. As the first test to follow *Rodriguez*, *Robinson* was proof that plaintiffs could potentially prevail at the state level. *Robinson* found no need to rely on tenuous *Brown* analogies. The genuine effect of *Robinson* was not in its failure to establish coveted claims, but rather in prevailing solely on the applicable education article of the state constitution. *Robinson* thereby opened the possibility of technical examination of state aid distribution formulas wherein analysis could be centered on whether the state financial aid distribution formula worked sufficiently well so as to not deny equal protection of state laws.

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48. San Antonio Indep. Sch. Dist. V. Rodriguez, 411 U.S. 1, 44 (1973).
49. Robinson v. Cahill, 303 A.2d 273, 284 (N.J. 1973).
50. *Id.* at 283.

The ruling of the *Robinson* court revealed the third approach of an emerging school finance litigation strategy. [51] Although the federal case had failed, *Serrano* and *Robinson* taken together indicated that plaintiffs could still bring claims for equal protection and fundamentality wherein an adverse federal ruling on the latter would not negatively affect equal protection claims under interpretation of the education clause of the individual state constitutions. Because the Tenth Amendment had placed educational responsibility with the states, this strategy would apply universally because all states had included some statement in the respective constitutions concerning public elementary and secondary education. The earliest overall strategies thus shifted to multiple prongs with sub-parts. The first prong of any challenge to a state aid distribution formula would direct the assault toward state courts. The second prong would seek relief under both federal and state provisions for equal protection. The third prong would seek a ruling for fundamentality in hopes of securing strict scrutiny. The fourth prong would challenge the education finance distribution formula under analysis of the education article, wherein chances for success could depend upon court analysis of the state constitutional framers' intent, the inclinations of each state court, persuasive litigation from other states, and the strength of language of the state education article itself.

The decisions and strategy derived from *Rodriguez, Serrano,* and *Robinson* have provided a legacy of intense litigation in most of the states. Since 1971, state aid plans have been held unconstitutional at the state supreme court level in a number of states.[52] These states have spurred the hopes of reformers, as each instance has provided another opportunity for determining the elements of successful state constitutional analysis. The universality of a winning strategy had not been perfected, as state courts reached different conclusions when confronted with the unique provisions of each state's statutes. More specifically, defendants as well as plaintiffs,

51. *See id.* at 273 (1973); Abbott by Abbott v. Burke, 119 N.J. 287 (1990). Generally, these cases have presented exhaustive statistical analysis on a wide variety of measures by both the plaintiffs and the defendants. At the time of this writing the state supreme court has issued thirteen education finance opinions with the most recent being Abbott VII; Abbott ex rel. Abbott v. Burke, 751 A.2d 1032, (2000); *see also* Stubaus v. Whitman, 770 A.2d 1222 (N.J. Super. Ct. App. Div. 2001).

52. Opinion of the Justices, 624 So.2d 107 (Ala. 1993); *see also*, Siegelman v. Ala. Ass'n of Sch. Bds., 819 So.2d 568 (Ala. 2001)); Roosevelt Elem. Sch. Dist. v. Bishop, 877 P.2d 806 (Ariz. (1994); Dupree v. Alma Sch. Dist., 651 S.W.2d 90 (Ark. 1983). *But see*, Lake View Sch. Dist. v. Huckabee, 340 Ark. 481, 10 S.W.3d 892, (2000); Horton v. Meskill, 486 A.2d 1099 (1985); Sheff v. O'Neil, 733 A.2D 925 (Conn. Super. Ct. 1999); Rose v. Council for Better Educ., Inc., 790 S.W. 186 (Ky. 1989); Helena Sch. Dist. v. Montana, 769 P.2d 684 (Mont. 1989); Abbeville County Sch. Dist. v. State, 515 S.E.2d 535 (S.C. 1999); Edgewood v. Kirby, 777 S.W.2d 391 (Tex. 1989); Seattle v. Washington, 585 P.2d 71 (1978); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Washakie County Sch. Dist. v. Herschler, 606 P.2d 310 (Wyo. 1980).

were improving the data analyses and the understanding of education finance data. The cases, at least in some instances, were moving beyond mere descriptive data accompanied by anecdotal data as was so often found in this arena. It has been suggested that to win the plaintiffs, or the state, must have an overall strategy of an outstanding legal team, an outstanding team of education finance experts along with a thorough understanding of the education finance research.[53]

While litigation has succeeded in many states, education finance distribution formulae have also been upheld in other states. State education finance distribution formulae have been challenged at various times and with various results.[54]

Several states have ruled that portions of the state education finance distribution formula were unconstitutional, e.g., in Idaho regarding the distribution of capital outlay financial assistance[55] and the methodology of funding classes for English language students in Arizona.[56] Several state supreme courts have overruled previous decisions. This has had the effect of changing the state education finance distribution formula. These states include Arizona,[57] North Carolina,[58] South Carolina,[59] Ohio,[60] and Texas.[61]

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53. R. Craig Wood, School Finance Litigation in America, Paper Presented at the National Organization on Legal Problems of Education (Education Law Assoc.) (Nov. 1992).

54. Lujan v. State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); Coalition for Adequacy & Fairness v. Chiles, 680 So. 2d 400 (Fla. 1996); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996); Unified Sch. Dist. v. State, 885 P.2d 1170 (Kan. 1994); *see also* Montoy v. State, No. 99-C-1738, 2004 WL 1094555 (Kan. Dist. Ct. 2004); Sawyer v. Gilmore, 83 A. 673 (Me. 1912); Hornbeck v. Somerset County, 458 A.2d 758 (Md. 1983); Milliken v. Green, 212 N.W.2d 711 (Mich. 1973); E. Jackson Pub. Schs. v. State, 348 N.W.2d 303 (Mich. App. 1984); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); State ex rel. Woodahl v. Straub, 520 P.2d 776 (Mont. 1974); Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993); Opinion of the Justices, 765 A2d 673 (N.H. 2000); Bismarck Pub. Sch Dist. No. 1 v. North Dakota, 511 N.W.2d 247 (N.D. 1994); Fair Sch. Finance Council v. State, 746 P.2d 1135 (Okla. 1987); Olsen v. State, 554 P.2d 139 (Or. 1979); Coalition for Educ. Equity v. State, 811 P.2d 116 (Or. 1991); Withers v. State, 891 P.2d 675 (Or. Ct. App. 1995); Withers v. State, 987 P.2d 1247 (Or. Ct. App. 1999); Danson v. Casey, 399 A.2d 360 (Pa. 1979); Scott v. Commissioner 443 S.E.2d 138 (Ga. App. 1993); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989); Vincent v. Wright, 614 N.W.2d 388 (Wis. 2000).

55. Idaho Sch. for Equal Educ. Opportunity v. State, 976 P.2d 913 (Idaho 1998).

56. Flores v. Arizona, 48 F. Supp. 2d 939 (D. Ariz. 1999) (ordering an adequacy study).

57. Roosevelt Elem. Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994) (effectively overturning the previous Arizona State Supreme Court ruling in Shofstal v. Hollins, 515 P.2d 590 (Ariz. 1973)); *see also* Roosevelt Elementary Sch. Dist. v. State, 74 P.3d 258 (Ariz. Ct. App. 2003).

58. Leandro v. State, 468 S.E.2d 543 (N.C. App. 1996), *rev'd.* 488 S.E.2d 249 (1997).

59. Abbeville County Sch. Dist. v. State, 515 S.E.2d 535 (S.C. 1999).

60. DeRolph v. State 728 N.E.2d 993 (Ohio 2000); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997).

61. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

From this overall litigation, significant features have emerged. First, the supreme courts in a number of states have declared that education is a fundamental right granted by the constitution of the state in question. Second, based on the state constitution, there are many states in which the highest court has declared that education is not a fundamental right. Third, there has been no perfect pattern whereby establishing fundamentality has automatically invalidated a state finance distribution formula by virtue of invoking coveted strict scrutiny. For example, the Arizona Supreme Court found that education was a fundamental right, but nonetheless ruled for the state in *Shoftstall v. Hollins* in 1973.[62] Similarly, the Wisconsin court declared in *Buse v. Smith*[63] that education was a fundamental right but later noted in *Kukor* that a rational basis was all that was required to uphold the state aid distribution formula when absolute denial of education is not at question. Fourth, the harshness of this reality has been somewhat softened by the logic of *Robinson*, as several state supreme courts have ruled for plaintiffs by finding equality a requirement, even absent the one feature of fundamentality that would invoke strict scrutiny analysis. Only one state other than California has declared wealth a suspect class, as the Wyoming supreme court in *Washakie County School District v. Herschler*[64] invalidated its education finance distribution formula, establishing that no equality could exist until funding was also equal.

III. RECENT ADEQUACY LAWSUITS

In recent years an additional movement has emerged in challenging the state finance distribution formulae. The plaintiffs argue that the state aid distribution formula is fiscally and thus educationally inadequate. Thus, it is argued, the state aid distributional formula fails the state constitutional mandate and the applicable statutory mandates for an education that meets minimal standards. A few of these suits have emerged after the applicable state supreme court has ruled that equity was either already met, or only the legislature could define such a concept. In a few instances, these suits essentially question the concept of "the equality of poverty." If a state aid distribution formula allocates funds in an equitable manner, but such funds were, by definition, unable to meet various educational and academic standards such a distribution formula would be by definition inadequate. The question then becomes whether the distribution formula then violates the applicable constitutional and statutory obligations of the state. The specific question is

62. 515 P.2d 590 (Ariz. 1973).
63. 247 N.W.2d 141 (Wis. 1976).
64. *Herschler*, 606 P.2d 310, 334 (Wyo. 1980).

how the plaintiffs are able to satisfactorily demonstrate this concept that reflects reality of such a large social science undertaking.

Various legislatures have unwittingly established a standard by which many plaintiff groups are able to question and attempt to quantitatively establish noncompliance via the state distribution formula. In the movement toward greater educational accountability and raising academic standards for the public schools of a given state, the legislature has, unsuspectingly, defined by statute what an adequate education consists of. Thus, when school districts are not able to meet those stated standards, due to fiscal constraints as placed upon them by various constitutional tax limitations, statutory and economic realities, the plaintiffs argue for relief. The relief sought is to declare the state aid distributional formula unconstitutional.

In recent years, state legislatures have faced an increasing number of challenges to the state financial distribution formula based on the concept of adequacy. Generally, the plaintiffs are not challenging the equity of the distribution formula in the conventional sense. Most recent arguments have centered not on whether wealthy and poor districts have roughly the same amount of revenue per pupil, but whether in general, there is enough funding to achieve state standards, and further, whether districts with higher concentrations of high need students have sufficient additional funding, beyond the basic level of funding, to achieve the same standards. In many cases, plaintiffs link insufficient overall funding, or insufficient additional support primarily in poor urban schools, to insufficient student outcomes occurring disproportionately in those same schools. The plaintiffs argue that, by virtue of the fact that certain groups of children are underachieving on these state-imposed sanctions, the distribution formula is, by definition, inadequate, at least for these groups of children.

A. Educational Adequacy

Also, increasingly, several states have attempted to determine the adequacy of public education. An overview of these adequacy studies reveals an increase of approximately thirty to fifty percent of expenditures that would be necessary to meet an adequate level for public education. Several studies have been conducted to date.[65] At the time of this writing, several states are exploring the measurement of adequacy. This list includes California, which has established the California Quality Education Commission and is charged with the responsibility of determining the educational com-

65. *See, e.g.*, JOHN AUGENBLICK, ROBERT PALAICH & JUSTIN SILVERSTEIN, AN ESTIMATION OF THE TOTAL COST OF IMPLEMENTING THE RESULTS OF THE SCHOOL FINANCE ADEQUACY STUDY (2003); JOHN AUGENBLICK & J. MEYERS, "SCHOOL FINANCE EQUITY & ADEQUACY IN SOUTH CAROLINA, *available at* http://www.thescea.org/pdf/schoolfunding.pdf (last visited Jan. 26, 2005).

ponents, fiscal resources, and corresponding costs necessary so that students can meet academic performance standards.[66] Oregon established the Quality Education Commission that published the Quality Education Model that utilized three broad-based panels to determine the costs of an adequate education in the state of Oregon.[67]

B. The Measurement of Educational Adequacy[68]

Determining the adequacy of public elementary and secondary education is, at best, a difficult task. In attempting to determine adequacy there are several models currently in practice. Important considerations for undertaking studies of educational adequacy include (a) conceptual, (b) contextual and (c) technical considerations.

1. *Conceptual*

Is a state legislature guided by *input* standards of adequacy or *outcome* standards? Does a legislature perceive an adequate education to consist of a prescribed set of educational inputs, such as numbers of teachers per pupil, materials and supplies and facilities? Or, does the legislature perceive an adequate education to be reflected in certain student outcome measures? Certain methods for measuring the cost of educational adequacy focus on schooling inputs, while others focus on schooling outcomes. Where a state legislature's emphasis is on achieving adequate outcomes, it is argued that the state should make use of outcome based, or performance oriented analyses.

2. *Contextual*

The political, economic, and demographic context of each state is different. Some states are more economically and demographically complex than others. Some states are more political diverse than others. Different methods may work better in different contexts. Key contextual questions include the following: Is there political consensus around desired inputs or outcomes? Is the state relatively homogenous or heterogeneous in geography, demographics, and economics?

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66. Cal. Educ. Code §§ 64200–64203 (West 2004).

67. QUALITY EDUCATION COMMISSION, PRELIMINARY QUALITY EDUCATION COMMISSION REPORT (2002), *available at* http://www.ode.state.dr.us/stda/qualityed/docs/qec2ExecSum4alelectronic.pdf.

68. This portion of this paper is adapted from R. CRAIG WOOD AND BRUCE BAKER, FINANCING MISSOURI'S PUBLIC ELEMENTARY & SECONDARY SCHOOLS: FINAL REPORT (2004).

3. *Technical*

Related to the demographic and economic complexity of a state are a variety of technical concerns. Different methods have different technical strengths and weaknesses. Key questions include: If the state were sufficiently heterogeneous, is the method in question sufficiently rigorous for estimating cost variations across school districts of different characteristics serving varied student populations? Are there sufficient data for estimating costs and cost variations?

C. Types of Adequacy Studies

Three major categories of adequacy studies presently dominate the landscape. Those categories include average expenditure studies, resource cost studies, and statistical modeling studies.

1. *Average Expenditure Studies*

Prior to the 1990s, concepts regarding educational adequacy were often guided by the average or median expenditures of school districts in the prior year. A common presumption was that median spending was adequate, and that states should strive to bring the lower half of districts up to the median.

With increased prevalence of state standards and assessments, consultants and policymakers in the early 1990s turned their attention to the average expenditures of school districts meeting a prescribed set of outcome standards, rather than the simple average or median of all school districts. This approach was coined the Successful Schools Model.

Successful schools studies utilize outcome data on measures such as attendance and dropout rates and student test scores to identify that set of schools or school districts in a state that meet a chosen standard of success. Then, the average of the expenditures of those schools or school districts was considered adequate (on the assumption that some schools in the state are able to be successful with that level of funding). Modified successful schools analyses include some consideration of how schools utilized the resources. This is done in either of two ways. In most cases, analysts may utilize data on how schools use the resources to identify and exclude peculiar, or outlier schools or districts from the successful schools sample. Alternatively, one might seek patterns in resource allocation to identify those schools that allocate resources in such a way as to produce particularly high outcomes, with particularly low expenditures. Early successful schools analyses in Ohio used data on district resource allocation as a partial basis for modifying the sample of districts to be used for calculating average costs of achieving standards. Proposed analyses in New York recommend deeper analyses of how successful districts organize resources.

2. *Resource Cost Studies*

The Resource Cost Model (RCM) is a method that has been used extensively for measuring the costs of educational services.[69] In general, RCM is a method for measuring costs of services, existing or hypothetical, adequate or not. The RCM methodology typically involves three steps: (1) identifying and/or measuring the resources (people, space, and time) used in providing a particular set of services; (2) estimating resource prices, and price variations from school to school or school district to school district; and (3) tabulating total costs of service delivery by totaling the resource quantities (resource intensity) and the prices. Resource cost methods have been used for calculating the cost of providing adequate educational services since the early 1980s.

Two relatively new variants of RCM have been specifically tailored to measure the costs of an "adequate" education—professional-judgment-driven RCM and evidence-based RCM. The difference between them lies in the strategy for identifying the resources required to provide an adequate education. In professional judgment studies, focus groups of educators and policymakers are typically convened to prescribe the "basket of educational goods and services" required for providing an adequate education. In evidence-based studies, resource needs for staffing and staff development are derived from "proven effective" Comprehensive School Reform (CSR) models like Robert Slavin's *Roots and Wings/Success for All*, which focus on improving educational outcomes in high poverty schools.[70] More recent evidence-based analyses have striven to integrate a variety of "proven effective" input strategies such as class size reduction, specific interventions for special student populations and comprehensive school reform models, rather than relying on a single reform model.

Because evidence based strategies have been recently broadened to include and blend a variety of reform strategies, this article utilizes the phrase evidence based rather than cost of comprehensive school reforms to describe the approach. It is noted, however, that this may lead to a blurred distinction between evidence based and professional judgment models. One might assume, for example, that a panel of well informed professionals

69. *See* United States Dep't of Educ. NATIONAL CENTER FOR EDUCATION STATISTICS, MEASURING RESOURCES IN EDUCATION: FROM ACCOUNTING TO THE RESOURCE COST MODEL APPROACH: WORKING PAPER NO. 1999-16 (1999), *available at* http://nces.ed.gov/pubs99/199916.pdf (last visited Jan. 26, 2004); W. Hartman, D. Bolton & D. Monk, *A Synthesis of Two Approaches to School-Level Financial Data: The Accounting and Resource Cost Model Approaches*, *in* SELECTED PAPERS IN SCHOOL FINANCE, 2000-01 (W. Fowler ed., 2001).

70. Allan Odden, Costs of Sustaining Educational Change Via Comprehensive School Reform, 81 PHI DELTA KAPPAN 433, 433–38 (2000).

would prescribe inputs for schools based at least partly on the professionals' knowledge of research literature on effective reform strategies. The subtle distinction between this and evidence based analysis is that evidence based analysis requires an empirical research basis for recommended resource configurations. Further, in evidence-based analysis the recommendation is provided by consultants conducting the cost study, and does not typically include panels of experts from schools and districts in the state.

3. *Statistical Modeling Studies*

Less common among recent analyses of educational adequacy are statistical methods that may be used either to estimate (a) the quantities and qualities of educational resources associated with higher or improved educational outcomes or (b) the costs associated with achieving a specific set of outcomes, in different school districts, serving different student populations. The first of these methods is known as the education production function and the second of these methods is known as the education cost function. The two are highly interconnected and—like successful schools analysis—require policymakers to establish explicit, measurable outcome goals.

Education production function analysis can be used to determine which quantities and qualities of educational resources are most strongly, positively associated with a designated set of student outcomes. For example, is it better for a school to have more teachers or fewer teachers with stronger academic preparation at the same total cost to maximize some desired outcome? Further, education production function analysis can be utilized to determine whether different resource quantities and qualities are more or less effective in districts serving different types of students (economically disadvantaged, English language learners), or in different types of districts (large urban, small remote rural).

Cost function analyses, like production function analyses, utilizes certain statistical equations. In cost function analysis, the goal is to estimate the cost of achieving a desired set of educational outcomes and further to estimate how those costs differs in districts with certain characteristics, serving students with certain characteristics. For example, achieving state average outcomes in a high poverty urban district may have quite different costs than achieving the same outcomes in an affluent suburb. A cost function that has been estimated with existing data on school district spending levels and outcomes, and including data on district and student characteristics, can be used for predicting the average cost of achieving a desired level of outcomes in a district of average characteristics serving a student population of average characteristics. Further, the cost function can be utilized to generate a cost index for each school district that indicates the relative cost of producing the desired outcomes in each school district. For example, it would likely be found that per pupil costs of achieving target outcomes are higher

than average in small, rural school districts, that costs are higher in school districts with high percentages of economically disadvantaged and limited English proficient children, and that costs are higher where competitive wages for teachers are higher.

The cost function is an extension of the production function where the goal is to estimate directly, in a single model, the costs of achieving desired outcomes, while with a production function, the goal is to identify those inputs that produce desirable outcomes, and subsequently estimate the cost of those inputs. To date, outcome measures used in cost function studies have been narrowly specified, including primarily measures of student achievement in core subject areas.

D. Reconciling the Various Approaches

In a perfect world, with perfect information regarding the relationship between resource mix and student outcomes (for guiding bottom-up analysis), perfect data on student outcomes, and perfect measures of district inefficiency (for guiding top-down analysis), resource cost and statistical cost function analysis would produce the same results. All distortions to or differences in cost estimates would be eliminated in each type of analysis. Resulting distortions of resource oriented versus performance-oriented analyses may be quite similar or quite different.

Ideally, investigators using resource cost approaches for calculating the cost of adequacy would have perfect information regarding the lowest cost mix of resources that would lead to the desired educational outcomes for a given set of students under a given set of conditions. As noted, resource mix is most often arrived at not by estimating the relationship between resource mix and existing student outcomes, but either by the recommendations of expert panels (professional judgment), or by identifying specific educational reform models believed by researchers to be effective. To date, evidence on the effectives, and more specifically the cost effectives, of comprehensive school reforms that commonly guide such analyses remains questionable at best.[71]

71. Henry M. Levin, *The Cost Effectiveness of Whole School Reforms No. 114 of Urban Diversity Series*, (ERIC Clearinghouse on Urban Education 2002); Geoffry D. Borman & Gina M. Hewes, *The Long-Term Effects and Cost Effectiveness of Success for All*, 24 EDUC. EVALUATION & POL'Y ANALYSIS 243, 243–66 (2003), *available at* http://www.successforall.com/Resource/PDFs/L; Geoffrey D. Borman et al., *Comprehensive School Reform and Achievement: A Meta-Analysis*, 73 REV. OF EDUC. RES. 125 (2002); Robert Bilfulco et al., DO WHOLE SCHOOL REFORM PROGRAMS BOOST STUDENT PERFORMANCE?: THE CASE OF NEW YORK CITY (Center for Policy Research, Working Paper No. 55, 2003).

Where the prescribed resource mix is not the most efficient mix that could be purchased at a given total cost, resource cost analyses will lead to distortions in cost indices and these distortions may or may not apply uniformly across school districts of varied scale or of varied student populations. For example, resource intensity required to achieve specific outcomes in a certain type of school district may be overstated by expert panels or prescribed models. It is safe to assume that most cost indices, produced by resource cost analyses include at least some such distortion.

Similar problems exist in the estimation of statistical models of costs. Statistical models of costs rely on existing school district expenditure data, and estimated relationships between expenditure data and current levels of student outcomes. Attempts are made to subtract inefficiencies from expenditure data. It is possible that a school district with a specific set of characteristics currently spends more than necessary to achieve its current level of outcomes. Further, it is possible that common patterns of inefficiency exist across all, or similar sets of school districts in a given state. Where some or all of these inefficiencies go unmeasured, actual costs (assuming either average, or maximum efficiency) of outcomes may be overstated for some or all districts.

1. *Findings of Cost Studies*

The growing track record regarding adequacy analysis, replication of analyses in the same states under different sponsorship, and application of alternative methods under the same sponsorship in some states provides increased opportunities to compare the results of adequacy studies and assess whether certain patterns exist. In this section, the findings of selected studies of the cost of an adequate education are discussed, focusing first on basic costs, then on additional costs associated with district characteristics and student population characteristics.

a. Basic costs

Table 1 summarizes the findings of average expenditure studies over the last decade. Note that in general, average expenditure estimates vary within a state as a function of choosing different desired outcome standards. When consultants select that set of school districts that achieve very high outcome standards, expenditures are often higher than when consultants select a set of school districts meeting more modest outcome standards. Note that this finding may occur for a variety of reasons. First, the logical assumption that it costs more to achieve higher outcomes may hold. However, because average expenditure studies fail to control for a variety of other school district factors, the higher spending rates of highly successful schools are often a function of high wealth communities that choose to

spend more on schools and at the same time, due to socioeconomic conditions, have high performing children. A recent study in Illinois made some attempt to accommodate this shortcoming by grouping schools by poverty rates. In Illinois, among low poverty schools, schools achieving the eighty percent standard spent, on average, $4,470 per pupil while schools achieving the 100% standard spent $5,270.

TABLE 1. RESULTS OF AVERAGE EXPENDITURE STUDIES

State	Study Release	Data/ Cost Year	Basic Cost (Current Dollars)	Inflation Adjusted Cost (2000 Dollars)	State Average Regional Cost Index	Regionally Adjusted Cost (2000 Dollars)
Mississippi	1993	1992	$ 2,614	$ 3,203	0.87	$ 3,675
Illinois (a)	2001	2000	$ 4,470	$ 4,470	1.04	$ 4,309
Ohio	1997	1996	$ 3,930	$ 4,304	0.99	$ 4,347
Colorado	2003	2001	$ 4,654	$ 4,514	0.99	$ 4,564
Ohio (low)	1999	1999	$ 4,446	$ 4,574	0.99	$ 4,619
Kansas	2001	2000	$ 4,547	$ 4,547	0.90	$ 5,059
Illinois (b)	2001	2000	$ 5,270	$ 5,270	1.04	$ 5,080
Missouri	2003	2002	$ 5,664	$ 5,389	0.95	$ 5,655
Ohio (high)	1999	1999	$ 5,560	$ 5,720	0.99	$ 5,777
Maryland	2001	2000	$ 5,969	$ 5,969	1.02	$ 5,853

Illinois (a) Low cost of 80% standard with low poverty
Illinois (b) Low cost of 100% standard with low poverty

Table 2 summarizes findings of resource cost studies, most of which have employed professional judgment panels to discern the appropriate mix of resources for schools. Table 2 includes estimates of resource costs for Kentucky, where an evidence-based approach was used. Regional and inflation adjusted estimates vary widely. Again, one might suspect that some of this variation is due to differences in desired outcomes from state to state. If professional judgment panels in Oregon were specifying a resource mix toward achieving a lower outcome standard than professional judgment panels in Missouri, then it would be reasonable that the cost of achieving those standards would be lower. Yet, the link between inputs and outcomes in resource based analyses remains relatively loose, and no attempts have yet been made with resource cost analysis, to estimate the costs of achieving alternative outcomes in the same state context, in the same year.

TABLE 2. RESULTS OF RESOURCE COST STUDIES

State	Method	Study Release	Data/ Cost Year	Basic Cost (Current Dollars)	Inflation Adjusted Cost (2000 Dollars)	State Average Regional Cost Index	Regionally Adjusted Cost (2000 Dollars)
Oregon	PJ	2000	2002	$ 5,762	$ 5,482	0.97	$ 5,668
Nebraska	PJ	2003	2002	$ 5,845	$ 5,561	0.89	$ 6,248
Montana	PJ	2003	2002	$ 6,048	$ 5,755	0.91	$ 6,336
Kentucky	EV	2003	2003	$ 6,130	$ 5,740	0.90	$ 6,408
North Dakota	PJ	2003	2002	$ 6,005	$ 5,714	0.89	$ 6,420
Kansas	PJ	2001	2000	$ 5,811	$ 5,811	0.90	$ 6,466
Maryland	PJ	2001	2000	$ 6,612	$ 6,612	1.02	$ 6,484
Colorado	PJ	2003	2001	$ 6,815	$ 6,610	0.99	$ 6,683
Indiana	PJ	2002	2002	$ 7,094	$ 6,750	0.94	$ 7,215
Washington	PJ	2003	2002	$ 7,992	$ 7,604	1.04	$ 7,316
Missouri	PJ	2003	2002	$ 7,832	$ 7,452	0.95	$ 7,819
Wisconsin	PJ	2002	2002	$ 8,730	$ 8,306	0.96	$ 8,674

Table 3 summarizes the findings from selected recent statistical models of education costs. These statistical models in particular present major advancements over average expenditure studies in that they not only include a direct link between expenditures and outcomes, but by using rich data on school district characteristics and student population demographics, the models can be used to simulate the costs of achieving state average outcomes in a district of average characteristics. Further, one can estimate how the costs of achieving average outcomes varies in school districts with high need student populations and how costs vary when one changes the outcome target to higher or lower than average outcomes. As with successful schools analysis, findings from New York state indicate that striving for higher outcome standards necessarily costs more, even in generally lower cost districts.

TABLE 3. RESULTS OF SELECTED COST FUNCTION STUDIES

State	Study Release	Data/ Cost Year	Basic Cost (Current Dollars)		Inflation Adjusted Cost (2000 Dollars)	State Average Regional Cost Index	Regionally Adjusted Cost (2000 Dollars)
Texas (Mean)	2001	1997	$ 5,610	1	$ 5,974	0.95	$ 6,321
New York (Low)	2002	2000	$ 8,423	2	$ 8,423	1.13	$ 7,471
Wisconsin (Mean)	1998	1995	$ 6,372	1	$ 7,168	0.96	$ 7,485
New York (Middle)	2002	2000	$ 8,652	2	$ 8,652	1.13	$ 7,675
New York (High)	2002	2000	$ 9,032	2	$ 9,032	1.13	$ 8,012

1. Cost of achieving average outcomes in district of average characteristics

2. Cost of achieving the designated performance standard for *upstate suburbs* presently below the specified standard. Average performance of upstate suburbs below the 140 standard was 130, below the 150 standard was 146 and below the 160 standard, was 149.

b. Additional costs of district needs and student needs

Table 4 summarizes the additional costs associated with small school district size from six separate resource cost studies. In each case the school district of minimum costs is represented with a cost index of 1.0. The minimum cost district is typically a larger, scale efficient district. Note that in Kansas a school district with 200 students was estimated as having costs forty-eight percent above those of a school district with 11,200 students. In North Dakota, in contrast, a school district with 208 students was estimated to have costs only nine percent above a large school district and in Nebraska a school district with 182 students was estimated to have costs ninety-three percent above the minimum. That said, when aggregated, all of the findings in Table 4 together suggest that costs generally level off in school districts with approximately 5,000 students, and increase most sharply in school districts with fewer than 300 students. This finding is consistent with recent comprehensive reviews of economic literature.[72]

72. Matthew Andrews et al., *Revisiting Economies of Size in American Education: Are We Any Closer to a Consensus?*, 21 ECONS. OF EDUC. REV. 245 (2002).

TABLE 4. ESTIMATED COST ADJUSTMENTS FOR ECONOMIES OF SCALE (RESOURCE COST)[73]

Enrollment	Kansas	Montana	Colorado	Missouri	North Dakota	Nebraska
96					1.70	
125			2.40			
130				1.53		
182						1.93
200	1.48					
208		1.33			1.09	
364				1.09		
400						1.40
430	1.27		1.52			
598					1.00	
748		1.11				
1,196				1.08		
1,300	1.15					1.31
1,500			1.18			
1,740		1.00				

73. John Augenblick et al., *Calculation of the Cost of a Suitable Education in Kansas in* 2000–2001 USING TWO DIFFERENT ANALYTIC APPROACHES (2002); John Augenblick & John Myers, *Calculation of the Cost of an Adequate Education in Maryland in* 2000–2001 USING TWO DIFFERENT ANALYTIC APPROACHES (2001); JOHN AUGENBLICK & JOHN MYERS, CALCULATION OF THE COST OF AN ADEQUATE EDUCATION IN MISSOURI USING THE PROFESSIONAL JUDGMENT AND THE SUCCESSFUL SCHOOL DISTRICTS APPROACHES (2003); Augenblick & Myers, Inc., *Calculation of the Cost of an Adequate Educ. in Nebraska in* 2002–2003 USING THE PROFESSIONAL JUDGMENT APPROACH (2003); AUGENBLICK, PALAICH & ASSOCIATES, INC., CALCULATION OF THE COST OF AN ADEQUATE EDUCATION IN NORTH DAKOTA IN 2002–2003 USING THE PROFESSIONAL JUDGMENT APPROACH (2003).

4,380				1.00		
5,200			1.00			
7,499					1.11	
8,450		1.04				
11,200	1.00					
12,500						1.00
18,370				1.04		
29,970			1.02			

Table 5 summarizes, by school district size, the estimated adjustments for the additional costs of serving children from economically deprived backgrounds. Additional costs are expressed relative to the basic costs in a large district. Especially among larger school districts, additional costs for serving at risk children appear relatively consistent, ranging from about thirty-five to about forty-five percent above basic costs.

TABLE 5. ESTIMATED COST ADJUSTMENTS FOR AT RISK (RESOURCE COST)

Enrollment	Kansas	Montana	Colorado	Missouri	North Dakota	Nebraska
96					41%	
125			61%			
130				43%		
182						26%
200	33%					
208		36%			23%	
364				35%		
400						28%
430	38%		44%			

598				37%	
748		37%			
1,196			41%		
1,300	58%				45%
1,500		42%			
1,740		37%			
4,380			35%		
5,200		37%			
7,499				45%	
8,450		42%			
11,200	44%				
12,500					42%
18,370			32%		
29,970		57%			

Table 6 presents the cost adjustments for meeting the needs of limited English proficient children. For smaller school districts, those costs vary dramatically, from 0 to 300 percent. But, for larger school districts, costs range from about sixty percent above basic costs to about 100 percent above basic costs for educating the limited English proficient child to specific outcome standards.

TABLE 6. ESTIMATED COST ADJUSTMENTS FOR LIMITED ENGLISH PROFICIENT (RESOURCE COST)

Enrollment	Kansas	Colorado	Missouri	North Dakota	Nebraska
96				0%	
125		300%			
130			0%		
182					189%
200	21%				
208				45%	
364			0%		
400					191%
430	22%	130%			
598				77%	
1,196			117%		
1,300	96%				114%
1,500		60%			
4,380			57%		
5,200		57%			
7,499				101%	
11,200	103%				
12,500					97%
18,370			61%		
29,970		71%			

Finally, Table 7 summarizes the additional costs estimated for at risk and limited English proficient children in New York, across different re-

gions of the state. In general, the researchers found that the additional costs of bringing at risk children to state average performance standards were approximately 100 percent or more above (or two times) state average spending. Similarly, additional costs of bringing limited English proficient (LEP) children to state average outcome standards exceeded 100 percent of average costs. This latter finding, for LEP children, is consistent with the findings of recent resource cost studies.

TABLE 7. ESTIMATED COST ADJUSTMENTS FOR AT RISK AND LIMITED ENGLISH PROFICIENT (STATISTICAL MODEL: COST FUNCTION)[74]

Region	At Risk (Free Lunch) Marginal Cost	Limited English Proficient Marginal Cost
Downstate Small Cities	1.07	1.24
Downstate Suburbs	0.98	1.21
New York City	1.29	1.26
Yonkers	1.16	1.29
The Big Three (Upstate)	1.34	1.22
Upstate Rural	1.09	1.19
Upstate Small Cities	1.15	1.20
Upstate Suburbs	1.04	1.18

IV. COMMENTARY ON ADEQUACY ANALYSES

Various methods for estimating the cost of an adequate education and how costs vary by district and student characteristics each have strengths and weaknesses. It is safe to say, however, that some methods are stronger and more empirically valid, at least for some purposes. For example, where state legislatures have an interest in understanding costs as they relate specifically and explicitly to student outcome standards, statistical methods that estimate directly the relationship between costs and outcome measures should be used. The connection between resources and outcomes proposed in professional judgment analyses is, at best, speculative. However, where states define adequate education partly or entirely on the basis of curricular opportunities that should be made available to students, resource cost analyses may be most useful.

74. WILLIAM D. DUNCOMBE, ESTIMATING THE COST OF AN ADEQUATE EDUCATION IN NEW YORK (Center for Policy Research, Working Paper #44, 2003).

Perhaps most problematic in the context of state policy design are evidence-based approaches to resource identification, like those used in Arkansas and Kentucky. The exercise of adequacy analysis is ultimately intended to measure the cost of implementing educational standards promulgated by state legislatures and potentially reviewed by state courts. Professional-judgment approaches purport to utilize state standards to guide resource specification, which may be reasonable where state standards specifically make mention of specific resources such as curricular offerings. Evidence-based models measure not the cost of implementing specific state standards but the cost of implementing specific educational models, in some cases commercial products, promoted by individuals or teams of model developers. A cost analysis guided by Robert Slavin's Comprehensive School Reform Model *Roots and Wings/Success for All* done for the state of Kentucky measures Robert Slavin's definition of an adequate education, and Robert Slavin's preferred set of educational and social outcomes, not the Kentucky legislature's preferred set of outcomes unless the legislature is willing to explicitly defer to the model on this issue.

A final important issue regarding adequacy analyses in the context of school finance litigation is the source of those analyses. Until recently, most adequacy analyses had been sponsored by state legislatures in an effort to inform policy redesign. In some cases those analyses were ordered by state courts. The recent successful use of legislative sponsored analyses by plaintiffs challenging present funding has spawned a flurry of analyses across states sponsored primarily by special interest and activist groups apparently hoping to use those studies as evidence of flaws or shortcomings in existing funding. These studies may produce findings that are useful to plaintiffs in articulating the shortcomings of existing funding. However, it must be observed that the burden on plaintiffs to validate that the study of education costs they sponsored represents an accurate measurement of the costs of achieving the legislature's standards is much greater than when the study is sponsored, overseen, and accepted (or at least not refuted) by the legislature itself.

V. BEYOND ADEQUACY

Two fundamental issues have emerged in recent years that are beginning to exert major influence in the arena of education finance litigation. The first concept is that states have begun to develop values and goals for public schools in terms of student achievement and standards. Unwittingly, these values and goals have lead to a quantitative standard of the success or failure of school districts. As discussed previously, this result has led to the argument that, by definition, these schools have failed and thus are deemed to be inadequate. A second, and larger, thrust has emerged as perhaps an unintended consequence as a result of the federal No Child Left Behind Act

(NCLB) passed by Congress in December 2001.[75] This federal law based on the concept of standards based reform requires each state to develop its own standards, to identify those schools that fail those standards, and to further identify those schools that do not make Adequate Yearly Progress (AYP) toward meeting those standards. Thus, in virtually every state, the plaintiffs and defendants will be able to fully access, examine, and analyze each school district's data, school by school, in order to determine which schools are not making AYP. Then, it will be argued, by extension, the state has demonstrated, on its own terms, and via federal statute, which schools are failing to meet AYP and, by definition, regardless of the state aid distribution formula are deemed to be "inadequate" by such a definition. In fact, one could suggest that this strategy will be piloted in a handful of states and, if successful, will lead to the next major wave of public education finance distribution challenges.

This presents a unique and difficult issue for a given state. First, it can be equally argued that negative outcomes under NCLB or even specifically "inadequate" outcomes as defined by state standards promulgated in response to NCLB necessarily implicate the education finance distribution funding formula as the cause of those outcomes. As such, these inadequate outcomes alone, may prove to be just as problematic for the plaintiffs as fruitful grounds for school finance challenge. There would, however, possibly be grounds for challenge on either state constitutional adequacy or federal or state substantive due process if, for example a state implemented high stakes testing in response to NCLB, then the legislature chose to dramatically underfund its highest need school districts relative to other school districts, leading to much higher fail rates on the high stakes test in high need school districts. However, even in this hypothetical, it could be argued that the system would only be open to challenge not when the system as a whole were underfunded but when specific types of schools, particularly high need ones, were relatively underfunded.

Specifically, the NCLB calls for the identification of schools that are in "need of improvement," or are "subject to corrective action." These standards of identification also call for schools to be identified that are "unsafe." The standards call for all schools to have 100 percent of students achieve proficiency on state standardized test by the year 2014. The number of schools making such lists is predicted to be significant in many states. Under NCLB each state sets its on standards, while this is certainly subject to criticism from a variety of sources, it is interesting to note that it will, in the long run, assist the plaintiffs in the education finance distribution challenges in that since the state set the standard, issues of reliability and validity are not germane to the state's defense.

75. 20 U.S.C. § 6301 (2002).

Increasingly, more states are attempting to determine the true costs of providing an adequate public elementary and secondary education. In some instances, this attempt is the result of a suit in which the court directs the legislature to make such a determination. In this manner, funding formula distribution patterns and amounts can be obtained for the state. Specifically, this was the result of a long history of litigation concerning the funding distribution patterns in the state of Arkansas.[76] The Arkansas Supreme Court directed the state to conduct an adequacy study. The court placed a January 2004 deadline for the legislature to remedy the state aid distribution formula that it found to violate the state constitution. As a result, in September 2003, the Arkansas Joint Committee on Educational Adequacy released a report that determined that the overall spending for public elementary and secondary education would have to increase by thirty-three percent to become adequate and to achieve the state's standards.[77]

The State of Ohio has presented a convoluted issue of judging adequacy of the education finance distribution formula.[78] In 1997 the state supreme court in *DeRolph v. State*[79] ruled that the state education finance distribution formula was unconstitutional and remanded to the common pleas court. The state supreme court directed the legislature to change the distributional formula. Plaintiffs again brought suit as to compliance and the order was clarified.[80]

The state appealed and the state supreme court allowed additional time for compliance.[81] The state supreme court ruled that the funding system was still unconstitutional.[82] After this decision, the legislature, again, increased funding for public education in the amount of $ 1.4 billion. In September 2001, the court issued *DeRolph III*[83] directing remedy measures for the legislature. In December of 2001, the court appointed a mediator to work between the parties. In March of 2002, the mediator stated that he had failed to produce an agreement between the parties.

The court vacated *DeRolph III* and held that *DeRolph I* and *II* were the law of the state and stated that school funding was unconstitutional.[84] In

76. *See* Lake View Sch. Dist. v. Huckabee, 340 Ark. 481, 10 S.W.3d 892 (2000); *see also* Lake View Sch. Dist. v. Huckabee, 76 S.W.3d 250, 349 Ark. 116 (2002); Tucker v. Lake View Sch. Dist., 323 Ark. 693, 917 S.W.2d 530 (1996).

77. ALLAN ODDEN, ET AL., AN EVIDENCED-BASED APPROACH TO SCHOOL FINANCE ADEQUACY IN ARKANSAS (2003).

78. *See* Bd. of Educ. v. Walter, 390 N.E.2d 813 (Ohio 1979); Miller v. Korns, 140 N.E. 773 (Ohio 1923).

79. DeRolph v. State, 677 N.E.2d 733 (Ohio 1997).

80. DeRolph v. State, 678 N.E.2d 886 (Ohio 1997).

81. DeRolph v. State, 728 N.E. 993 (Ohio 2000) (*DeRolph I*).

82. DeRolph v. State, 780 N.E.2d 529 (Ohio 2002) (*DeRolph II*).

83. DeRolph v. State, 754 N.E, 1184 (Ohio 2001) (*DeRolph III*).

84. *DeRolph*, 780 N.E.2d at 529 (*DeRolph IV*).

March of 2003, the state filed a writ of prohibition seeking that the court of common pleas from exercising any further jurisdiction. On May 16, 2003, the Ohio State Supreme Court issued its opinion in *State v. Lewis*[85] in which it ended further litigation by declaring the education finance distribution formula was unconstitutional and directed the legislature to remedy the situation. The court did not retain jurisdiction in this case.

In August of 2003, the plaintiffs filed a Petition for *Writ of Certiorari* before the U.S. Supreme Court contending that the state supreme court violated the U.S. Constitution's due process clause because it prevented the enforcement of a court ordered remedy and denied the plaintiffs equal protection because Ohio school children were treated differently than other successful litigants before the Ohio courts. In October of 2003 the Court denied certiorari.[86] Ohio illustrates a perfect instance in which the court issues its directive and the legislature knowingly fails to follow its directive. The state of Ohio illustrates the issues in which even if a court opinion were to be offered and directed at the legislature, dependant upon the political context of the state the actual implementation of such a directive is not a foregone conclusion.

Several states have current adequacy suits in various stages. North Carolina is a prime example of a state still within the restrictions of an adequacy suit. In *Leandro v. State*[87] the courts linked the failures of the plaintiff school districts to the state learning standards. In a series of opinions, the courts have ruled that the state must fund at-risk students. Hearings have been held over several years. The court issued a number of interpretive orders declaring that the failure of at-risk students was a function in insufficient state funding and lack of implementation of successful programs.[88]

The Wyoming Supreme Court ruled the state distributional formula unconstitutional.[89] In doing so, the court ordered a detailed cost analysis. The legislature had passed and identified the core knowledge and skills of students so as to constitute a "proper" education. On February 23, 2001, the Wyoming Supreme Court upheld the new cost-based distribution formula and stated that it was capable of fulfilling the constitutional guarantees.[90] The court did note that a variety of factors should be analyzed every five years and adjustments due to inflation at least every other year.

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85. 789 N.E.2d 195 (Ohio 2003).

86. DeRolph v. Ohio, 540 U.S. 966 (2003) (denying the petition for writ of certiorari).

87. 468 S.E.2d 543 (N.C. App. 1996).

88. *See* Hoke County Bd. of Educ. v. State, No. 95CVS1158, 2000 WL 1639686 (N.C. Super. Oct. 12, 2000), *rev'd* 599 S.E. 2d 365 (N.C. 2004).

89. Campbell County Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995)

90. State v. Campbell County School Dist. 19 P.3d 518 (Wyo. 2001); *see also* State v. Campbell County School Dist. 32 P. 2d 325 (Wyo. 2001).

The State of New York has presented a lengthy and far reaching adequacy issue. In *Campaign for Fiscal Equity v. State*,[91] the New York Supreme Court ruled that the New York City schools were inadequately funded and therefore the state distributional formula was held to be unconstitutional. On appeal, the appellate court ruled on behalf of the state in requiring that the state's obligation was only for certain grade level proficiencies. The New York highest court, the State Court of Appeals on June 26, 2003 issued its ruling in *Campaign for Fiscal Equity v. State*[92] in which it upheld the trial court stating that the public schools of New York City were inadequately funded and thus unconstitutional and directed the state to determine the cost of a "basic meaningful education" within the public schools of New York City. The majority opinion, as described by the dissent, stated under its final remedy summary the following:

> The majority first directs the State to determine the actual cost of a "sound basic education" and to ensure that every school in New York City has the necessary funding to meet the standard, and sets a deadline. The funding level must reflect the cost of a "sound basic education" that is not tied to anything other than a "meaningful high school education." The majority also remands the case to the trial court to review the Legislature's efforts to determine if under the new funding scheme "inputs and outputs improve to a constitutionally acceptable level."
>
> This remedy is extraordinary, if not unprecedented. Having determined that the State is not satisfying its constitutional obligations with respect to the education of New York City's public school children, we should—as the State requests—simply specify the constitutional deficiencies. It is up to the Legislature, as the entity charged with primary responsibility under the Education Article for maintaining the State's system of public education, and the Executive, who shares responsibility with the Legislature, to implement a remedy. This lawsuit should be at an end. Instead, the majority, observing that "the political process allocates to City schools a share of state aid that does not bear a perceptible relation to the needs of City students," casts the courts in the role of judicial overseer of the Legislature. This disregards the prudential bounds of the judicial function, if not the separation of powers.
>
> Moreover, as soon as the trial court is called upon to evaluate the cost and educational effectiveness of whatever new programs are devised and funded to meet the needs of New York City's school children, the education policy debate will begin anew in another long trial followed by lengthy appeals. The success of the new funding mechanism will then be tested by outputs (proficiency levels). This dispute, like its counterparts

91. *Id.*

92. 801 N.E.2d at 326 (Read, J., dissenting) (internal citations omitted).

> elsewhere, is destined to last for decades, and, as previously noted, is virtually guaranteed to spawn similar lawsuits throughout the State.[93]

The overview of this arena indicates an uncertain patchwork of decisions. Yet, despite the uneven record, there are indicators of which claims have consistently received the most court sympathy or rejection. First, it is extraordinarily rare to reach wealth as a suspect class. As stated very early in *Robinson*, the unintended implications for society are too broad in that all other government services could be immediately subject to the same claim. Second, fundamentality is only slightly less rare, as courts are slow to construe new rights from state constitutions and for which federal precedent is adverse. Third, federal equal protection is *derigueur* in claim, but state equal protection is a key to overturning state aid distribution formulas. This is a strategy that does not usually work well unless the education article can also be invoked in a plain reading that requires the state to accomplish what it set out to do. For example, the Supreme Court of Texas in *Edgewood* in 1989 stated "[w]hether the legislature acts directly or enlists local government to help meet its obligation, the end product must still be what the constitution demands."[94] Taken collectively, this suggests that favorable rulings depend at least in part on specific language in state constitutions. Again, as Wood has stated, the successful party must have an outstanding legal team, an outstanding education finance research team, and a well-grounded knowledge of education finance research.[95] While the relationship may not be perfectly incremental as language increases, in most instances the opportunity for success does diminish rapidly as language becomes more vague.

A. Principles and New Directions in Litigation

First, it may be safely stated that litigation will not achieve great success in federal courts due to limited avenues for bringing school finance challenges to the federal courts. Given the present composition of the Supreme Court this seems highly unlikely as well as the Supreme Court's historical reluctance to create new fundamental rights, that path will disappoint reformers unless a nexus to other fundamental rights can be better established. Despite *Plyler*, the Supreme Court has stood firm in determining that education is a most important responsibility of state and local governments.

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93. *Id.* at 368.

94. 777 S.W.2d at 398.

95. R. Craig Wood, Presentation School Finance Litigation in America, at the National Organization on Legal Problems of Education (Nov. 1992); *see also* R. Craig Wood & Jeffrey Maiden, *Resource Allocation Patterns Within School Finance Litigation Strategies*, *in* SIXTEENTH ANNUAL AMERICAN EDUC. FIN. ASS'N YEARBOOK (Lawrence L. Picus & James L. Wattenbarger eds., 1995).

Similarly, wealth as a suspect class is an unfruitful attack unless the Supreme Court unexpectedly reverses itself or unless plaintiffs can show overwhelming and consistent wealth-education discrimination against individuals. Likewise, federal equal protection will remain largely unavailable except when established suspect classes can be linked to education finance or where states overtly, differentially treat individuals without rational basis. The only other alternative is by changes in the Supreme Court itself. Under these conditions, a federal plea will receive sympathy only by dramatic breakthroughs or by new political appointments.[96]

Second, we may confidently state that litigation will continue in state courts into the foreseeable future. Although the record in state courts has been mixed, plaintiffs have achieved their only successes at this level. Within state courts, it is equally evident that the plea for fundamentality will experience very limited success, as these courts will frequently apply the federal test in the absence of strong state constitutional provisions. It must, of course, be noted that few state constitutions have the language needed to unquestioningly require strict scrutiny. Even when such language is present, it should still be recognized that many courts will hesitate at fundamentality because of the powerful analysis found long ago in *Robinson* in which the Court perceptively recognized that society itself could be unintentionally transformed by hasty declarations of fundamentality because even a noble goal could be twisted under law by turning other mere social conveniences into fundamental rights. As such, litigation in state courts will continue to turn on issues other than fundamentality or wealth suspectness.

Third, it is likely that *Serrano* logic will have only limited utility in that courts have generally moved beyond striking down education finance distribution formulae that are unequal without evidence that inequality results in an inadequate education. While this result may appear regressive, there is an attractive logic that underlies it. The court in *Serrano* presumably did not care that the system could be adequate without being equal—in contrast, the predominance of subsequent decisions have attempted to determine if inequality were in fact followed by inadequacy. While the standard appears to be lowered, it may be ultimately beneficial in that the linkages between resources and equal opportunity will be resultantly strengthened because plaintiffs will be required to demonstrate these effects. In the past this has been a difficult hurdle for the plaintiffs. As discussed above, the No Child Left Behind Act and the various state standards could conceivably make such hurdles achievable in a relative fashion.

96. This discussion is confined to changes brought about by the legal system itself. It does not consider other strategies such as congressional action or constitutional amendment to achieve the same ends.

Fourth, the potential demise of *Serrano* logic also speaks to dubious survival of strategies based only in noble theories and moral outrage. The failure of this strategy is evident in the shambles of federal hopes after *Brown*, leading to the conclusion that there is high regard for conscience in the context of the law, but lawsuits are generally won by constitutional obligations. Instances of "soft" litigation are rare, and the outrage in *Pauley* is generally nonreplicable at the state level as well, as is its level of judicial prescription.[97] Likewise, Wyoming's requirement of nearly equal expenditures is not generally likely to recur elsewhere. This view is especially reinforced in compliance litigation, as even in *Serrano II*[98] the court was satisfied when most fiscal variations were erased. This logic was also echoed in *Horton II*,[99] as the court under constitutional fundamentality required only that disparities not be so great as to be unconstitutional. This was also the overwhelming view of the Virginia Supreme Court in *Scott v. Commonwealth* in which the court stated that disparities were acceptable as long as all school districts were minimally adequate as defined by the state constitution.[100]

Fifth, it is likely that the *Robinson* strategy of scrutinizing the education clause of individual state constitutions will continue to be the most promising strategy. This certainly applies in the latest adequacy suits. It is also consistent with the foregoing in that the greatest scrutiny will likely rest in how closely the state achieves its adequacy aims when measured against its constitutional requirements and state imposed academic accountability requirements.

Adequacy studies continue to evolve, as a tool for legitimately guiding policy development, producing increasingly consistent results regarding additional costs associated with school district characteristics and student needs in recent years. Adequacy studies may have a place in school finance litigation, especially where state legislatures, having sponsored their own analyses, openly acknowledge inadequacies and inequities of existing school funding and remain intractable. Cases that reach this extreme are likely limited. As such, legislatures should approach cautiously while being

97. Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979). *Pauley* stands almost alone in the court's willingness to engage in judicial remedy for fiscal inequities. The court ordered creation of a Master Plan addressing in minute detail each deficiency of educational program and its support mechanism, which today has resulted in millions of new dollars to education and massive restructuring of education on a statewide basis that is linked to student outcomes. To some extent, the same remedy can be seen in Kentucky where *Rose v. Council*, 790 S.W. 2d 186 (1989) required total reconstruction of the educational system.

98. Serrano v. Priest, 557 P.2d 929 (Cal. 1976).

99. Horton v. Meskill, 486 A.2d 1099 (1985).

100. 416 S.E.2d (Va. 2001). For a complete discussion of this case see R. Craig Wood, *Scott v. Commonwealth: Virginia Courts Consistently Rule Against Education Finance Equalization Claims*," 115 WEST'S EDUC. L. REPORTER 1.

receptive to the need for stronger empirical bases on which to build rational school finance policy. While lack of rational empirical information regarding the overall cost of achieving desired outcomes may protect somewhat against state constitutional adequacy challenges, lack of rational basis for why current funds are allocated in greater amounts to some schools and some children than to others may increase vulnerability to equal protection challenges in either state or federal court.

Robinson demonstrated that fundamentality and suspectness are not absolute prerequisites to success, and most subsequent winning litigation stands as further proof to this truth. The ephemeral and intangible nature of fundamental rights and wealth suspectness is frustrating to courts, which in contrast can usually make plain reading of state education articles and apply the more tangible concept of equal protection and the quantifiable standard of some goal of adequacy. Given that courts have no dispositive proof to presuming the linkage between wealth and opportunity, tying specific language to factual analysis in the context of equal protection likely explains the success of the *Robinson* strategy.

Sixth, it is likely that different decisions will continue to be handed down by state courts using the *Robinson* strategy for several reasons. One reason is obviously that different constitutions state significantly different things. A second reason is that courts themselves cannot examine language so dispassionately as to read nothing into the language except the words, i.e., words are subject to perceptual political/social filter.[101] Still a third reason is that the language in many state education articles is nearly empty. In these cases, courts are exhibiting an interest in constitutional debate analysis wherein the court examines the framing of the constitution to determine the intent in the education article. Although it has been suggested that many legislatures had no motive deeper than copying other states' education articles, the more recent decisions in Kentucky and Texas seriously examined the framers' intent in order to determine the meaning of "thorough and/or efficient" phrases. An increasingly common strategy combines the framers' intent, litigation from similar states, measures of adequacy, or lack thereof, as well as jurisdictional precedent to cast a plain reading of the education article. Thus decisions will be different among the states, with some influence by other reform aided or deterred by the inclinations of the court itself.

Seventh, it is likely that courts will always be reluctant to engage in specific judicial prescription as a remedy to education finance distribution problems because courts are bound to respect the separation of powers. For

101. For an analysis of education finance litigation via a political/social interpretation see Karen DeMoss, Political Dispositions and Education Finance Equity: An Analysis of Court Decisions Across the United States (unpublished Ph.D. dissertation, University of Chicago) (on file with author).

decades, courts have hesitated to intervene in legislative affairs, nothing that they have neither the power nor the expertise to prescribe solutions to political questions. Courts generally rule only on questions of law brought before them and direct the issues to the legislatures for remedy. As such, in one sense courts are poor tools to force reform, as they will almost always stop short of providing actual remedy.[102] In addition, the courts can actually frustrate reform since a favorable decision for plaintiffs by no means guarantees immediate or receptive legislative response; for example, the response to *Edgewood* in Texas was a call for a constitutional amendment that would nullify the court's decision. Ohio, as discussed above, appears to be no closer to an acceptable remedy that will satisfy the plaintiffs than it was before *DeRolph*. The present legislative struggles as a result of *Lake View*[103] in Arkansas appear to fall into this arena as well. Alternatively, however, much progress has been wrought by litigation. As a consequence, a natural tension will continue to slow reform, as courts will not readily pursue direct intervention strategies.[104]

Eighth, it is likely that reform will be slow and will remain incomplete for many years. In one sense, the legal and policy issue was identified so many years ago in *Sawyer* in 1912 when the court stated, "[t]he method of distributing the proceeds of a tax rests in the wise discretion and sound judgment of the Legislature. If this discretion is unwisely exercised, the remedy is with the people, and not with the constitution,"[105] a view consistently upheld and confirmed by *Rodriguez*. Thus, it should be noted that legislatures may engage in policies that are perhaps unwise as long as these policies are not unconstitutional. Under these conditions, it would seem that reform has gained little ground in this regard. Yet, on the other hand, it is encouraging to note that standards do change with the times, as contemporary views regarding inequality have led to significant judicial intervention by state courts. Indeed, *Sawyer* may have been right for the wrong reasons, i.e., justice makes few errors of haste, and rapid change is often available only at the voting polls. Thus litigants expecting dramatic events may be disappointed. But it still should be stated that deliberateness can be beneficial, as dizzying change may not be wise public policy.

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102. Even where courts have become enthusiastic in judicial prescription, they have usually later modified their zeal. *See, e.g.*, Pauley v. Kelly, 255 S.E.2d 859 (W.Va. (1979).

103. Lake View Sch. Dist. v. Huckabee, 351 Ark. 31, 91 S.W.3d 472 (2002).

104. The question whether litigation actually leads to significant financial reform, that is, greater equity as well as adequacy has yet to be clearly defined. *See, e.g.*, Michael C. Petko, A Statistical Analysis of the Effect that Education Finance Litigation Has On Per Student Revenues in the United States (unpublished Ph.D. dissertation, University of Fla.) (on file with author).

105. Sawyer v. Gilmore, 83 A. 673, 677 (Me. 1912).

However, reality dictates that there are extreme cases in which the judicial branch must engage with the state legislature to seek a solution to the manner and funding of public education within a given state. State legislatures can be unable to recast the supply of state and local resources for public elementary and secondary education for a variety of policy reasons. It is a reality that in some instances state legislatures have engaged in arbitrary and capricious allocation of funding that seriously disadvantages the state's larger more urban school districts. In other instances, it has disadvantaged small and rural school districts. Indeed this is primarily an equal protection concern, but there are legitimate related adequacy concerns as well.

Emerging patterns from recent studies of the cost of education assist in guiding policy reform either proactively, or reactively by producing new benchmarks for judicial analysis. While inexact, recent findings are increasingly consistent, and strikingly different than the current package of arbitrary recommendations that are most often thrown around for cost adjustments.

The net sum of over a quarter century of intense education finance litigation finally proves that the outcome of future lawsuits cannot be known. Too many variables impact on an ever-changing social milieu, and the courts themselves are never certain of whether to lead or to reflect society's thinking. Courts seem at times to be ahead of the political readiness, while in other obvious ways they are behind. The political climate of legislatures adds greatly to the litigation equation, as states themselves shape the frequency and intensity of litigation by the legislatures' relative vigilance to equity concerns. While no amount of money can ever satisfy all parties, most are satisfied when the distribution at least appears fair and is minimally adequate. Legislatures, however, are generally faced with competing demands from all corners of society for which sufficient funding is beyond the means of the state. Yet there has been great change flowing from litigation; states have assumed greater shares, taxes have been better equalized, and expenditures are higher. In addition, reform has become a political agenda seized upon by presidents, governors, and legislators. Thus, while equity has far to go, the power of a court should never be underestimated; if it were not for litigation, it is absolutely certain that less progress toward fundamental fairness in the financing of public elementary and secondary education would exist today.

Although these conditions indicate that only uncertainty itself is certain, the long-range view still demands optimism. The political pendulum swings, and equity and adequacy will continue to rise and fade in cycles. It cannot be otherwise because people will protect their resources, giving rise to disputes. Public elementary and secondary education remains a great and noble cause since life's opportunities are in large measure a product of the education received by children. If money were inadequate to these ends,